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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CALVIN W. BURNETT, et al.,

Petitioners,

—v.—

JAMES R. GRATTAN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

IN SUPPORT OF AFFIRMANCE

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INTEREST OF AMICUS*

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members, dedicated to protecting the civil rights and liberties of Americans. Since 1920, one of its constant concerns has been the need to provide adequate legal mechanisms to protect against, and remedy, violations of constitutionally protected rights.

Amicus has frequently appeared before this Court in support of the historic role of 42 U.S.C. § 1983 in remedying the violations of federal civil rights and deterring departure from constitutional standards. We submit this brief amicus curiae to urge the Court to preserve the role of § 1983 in enforcing fidelity to the constitutional

* Letters of consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

obligations of state officials entrusted with public power.

STATEMENT OF THE CASE

This action was brought pursuant to 42 U.S.C. §§ 1981, 1983, 1985 and 1986 and Article 23 of the Maryland Declaration of Rights.[1] The plaintiffs were state employees of Coppin State College, a public institution of higher education operated by the State of Maryland, who were discharged from their positions in June, 1976. Defendants are the president of the college, the vice president of student affairs, and the chairman and executive director of the board of trustees. The plaintiffs allege that the defendants discriminated against them by

[1] Since no final judgment has been rendered in this case, this Court need not address the question whether Pennhurst State School and Hospital v. Halderman, No. 81-2101, 52 U.S.L.W. 4155 (1984), bars adjudication of the pendent state claim by the federal court to which defendants removed this case. See Patsy v. Board of Regents, 457 U.S. ___, 73 L. Ed. 2d 172, 187 n. 19 (1982).

firing them because of their race (they were white employees in the predominantly black school); plaintiff Adrienne Hedman also alleges that she was discriminated on the basis of her sex.

Plaintiffs filed claims of race and sex discrimination with the E.E.O.C. immediately after learning of their pending termination in June, 1976. While these claims were pending, they filed suit in state court on February 17, 1977, charging that their dismissals were arbitrary, capricious, and without basis in law and fact. In October, 1981, they filed an amended complaint, adding claims of race and sex discrimination under Sections 1981 and 1983. That action was removed by the state defendants from state to federal court. Thereafter, the defendants filed a motion to dismiss the action on statute of limitations grounds, claiming that the appropriate limitations period was the

six-month period for administrative complaints provided for in Md. Ann. Code, Article 49B.

The district court granted the motion to dismiss. On appeal, the Court of Appeals for the Fourth Circuit reversed. It noted that it was necessary to "look to Maryland law to borrow the limitations period for the most analogous state action." 710 F. 2d at 162. The choices available to the Court were: (1) the six month period prescribed in Article 49B, which the district court had accepted; (2) a five-and-a-half-month period derived from various provisions in Md. Ann. Code. Article 64A, § 33, and Rules of the Maryland Court of Appeals; and (3) the three year residual period in Md. Ann. Code, Courts and Proceedings, § 5-101.

The Court of Appeals rejected the six-month period found in Art. 49A on the basis of its previous opinion in McNutt v. Duke

Precision Dental and Orthodontic Laboratories, 698 F. 2d 676 (4th Cir. 1983), which had identified the shortcomings of the administrative period prescribed in Art. 49B:

> We reasoned that while such a short period might suffice to present an informal complaint which could then be fleshed out by the Commission, it was an inadequate time in which to prepare a formal complaint suitable for adversary proceedings in federal court, and that for this reason it was unlikely the Maryland legislature intended that this limitations period apply to civil actions.
> 710 F. 2d at 162

The Court of Appeals also found the provisions of Art. 64A inadequate as a model for adopting a Section 1981 and 1983 limitations period:

> We think it even less likely that the Maryland legislature intended that the limitations period defendants derive from Article 64A and related sources be applied to civil actions for discrimination. That period is even shorter than the period considered in McNutt. A proceedings under Article 64A is an administrative proceeding and the largest part of it -- 130 of the total of 165 days -- is spent formally adjudicating a claim initiated by the state.

The Court of Appeals properly recognized that the burden on the state in such a proceeding was far different from the burden on an individual litigant in an affirmative action under § 1983. Thus, even if the state

> legislature thought this adequate time to resolve a termination dispute in which the state must frame the issues and bear the burden of proof, [that fact] hardly evidence[s] an intent to impose a similar limit on the time in which an employee who is discharged may employ counsel who will investigate the termination and prepare a complaint. Indeed, under Maryland law a disgruntled employee, after proceedings under Article 64A are concluded, may turn to the State Human Relations Commission for relief from discrimination. Md. Ann. Code, Article 49B, § 7(b)(1). This, too, indicates that the Maryland legislature did not intend that the passing of a 165-day period should bar an employee from seeking administrative or judicial relief for discriminatory termination.
> 710 F. 2d at 162-64.

SUMMARY OF ARGUMENT

This case presents essentially a question of state law. The Court of Appeals, like nearly all the lower federal courts, rejected administrative complaint limitations

periods as the most analogous statute of limitations for civil rights actions brought under Sections 1981 and 1983. It did so based on its belief that the state legislature and the state courts would have done so. It reasoned that the administrative complaint period is short because it is generally used merely to file an informal complaint with a state board to trigger an investigation, and thus a short period is all that is required. Yet such a short period is not necessarily the appropriate time for investigating and preparing a full plenary judicial action. The purpose of the administrative scheme is different from a full adversary judicial action. It is used for informal conciliation and possible settlement. Furthermore, adopting the administrative limitations period would restrict the full scope of the civil rights laws. Finally, adopting the administrative

period would encourage the filing of more civil rights cases before any effective effort could be made to seek conciliation at the state level. This would perversely increase the number of federal civil rights cases, whereas a longer limitations period might well permit the resolution of many such claims within the state administrative scheme.

ARGUMENT

THE SIX MONTH ADMINISTRATIVE COMPLAINT LIMITATIONS PERIOD FOUND IN MARYLAND LAW IS NOT THE MOST ANALOGOUS STATE LIMITATIONS PERIOD FOR SECTIONS 1981, 1983 AND 1985 CASES

We start with the basic proposition that under Section 1988, a federal court is compelled to look to the most analogous state statute of limitations to determine the limitations period for an action brought under Sections 1981, 1983 and 1985. Although certain other federal causes of action may

borrow federal limitations periods, e.g., DelCostello v. International Brotherhood of Teamsters, 51 U.S.L.W. 4693, 4695 (June 8, 1983) (cause of action for breach of duty of fair representation borrows limitations period from N.L.R.B. Sect. 10(b)), the congressional directive expressed in Section 1988 requires initial consideration of state limitations periods for a civil rights case. See Chardon v. Soto, 51 U.S.L.W. 4832 (June 20, 1983). Petitioners do not argue to the contrary.

Thus the principal issue in this case is whether the six month period specified in Md. Ann. Code, Art. 49B is the analogous state statute to be applied in this case.[2] Since

[2] If the six month statute is the most analogous statute, the Court must also decide whether it is otherwise not suited to accomplishment of the purposes of § 1983. Although amicus addresses principally the first question herein, we agree with respondents that the six month period is indeed so ill-suited to the purposes of § 1983 that it may not be borrowed under §1988.

it appears that the only viable alternative to Art. 49B is the three year residual period in Md. Ann. Code § 5-101, elimination of the administrative limitations period found in Art. 49B (and the comparable provisions in Art. 64A) would require affirmance of the decision below.

A. Nonjudicial Administrative Complaint Periods Are Not An Appropriate Model For Federal Civil Rights Limitations Periods

It has been the almost universal rule in the lower federal courts that limitations periods for filing administrative complaints with state administrative boards are not to be borrowed by federal courts in determining the applicable federal limitations period for civil rights actions. As Judge Haynsworth noted in McNutt v. Duke Precision and Dental and Orthodontic Laboratories, supra, 698 F. 2d at 678, "The majority of lower federal courts have held that a statutory limitation upon the initiation of administrative

proceedings is not applicable to a judicial action to enforce a civil right derived from the Civil Rights Act of 1864."[3] Only the First Circuit seems ever to have taken a contrary view, and it has now joined the majority, as explained below in Point I B.

The reason for such a rule was explained by the Seventh Circuit in Waters v. Wisconsin Steel Works, 427 F. 2d 476, 488 (7th Cir. 1970), a case involving a 120-day period of limitations for filing discrimination claims with the Illinois Fair Employment Practices Commission. The Court concluded that the period for filing such a charge could not serve as the borrowed limitations period for § 1981 or 1983 claims:

> We are not convinced that the Illinois F.E.P.A. is the most analogous state action under these provisions. The Illinois act provides only for an administrative remedy and review of the

[3] Judge Haynsworth cited numerous cases in support of this proposition. See id. at n. 3.

F.E.P.C.'s findings in the state courts. Different considerations obviously apply to suits by private litigants in courts of law. In contrast to the Illinois F.E.P.A., the entire burden of investigating and developing a case under section 1981 lies with the private litigant. Furthermore, the short limitations period contained in the Illinois act is designed to encourage conciliation and private settlement. When an aggrieved party seeks court relief, conciliation has generally failed.

The Eighth Circuit came to the same conclusion in rejecting a 180-day administrative complaint procedure under Nebraska law as the limitations period for a Section 1981 and 1983 claim. See Chambers v. Omaha Public School District, 536 F. 2d 222 (8th Cir. 1976). The court compared the Nebraska administrative procedures with the Illinois procedures in the Waters case and found them similarly inapplicable to plenary federal actions under the civil rights statutes:

> Each of the statutes vests substantial authority in the respective administrative agencies to order

> affirmative remedial steps to eliminate the effects of the discriminatory employment practices. Ill. Rev. Stat. ch. 48, § 858 (1969), as amended, P.A. 79-465 (1975); Neb. Rev. Stat. § 48-1119(3). Both agencies possess the authority to compel testimony through the issuance of subpoenas in order to fulfill their statutory obligation to investigate and conciliate discrimination complaints. However pervasive the authority of these F.E.P.A. established agencies may be, we do not think that the procedures and remedies which are administratively available pursuant to the F.E.P.A. can be equated with the plenary judicial powers available in § 1981 and § 1983 actions. We hold that the F.E.P.A. period of limitation cannot be applied in the present case.
> Id. at 226-27.

Both the Ninth and Tenth Circuits have reached similar conclusions for similar reasons. See Sethy v. Alameda County Water District, 545 F. 2d 1157, 1162 (9th Cir., 1976) (en banc); Shouse v. Pierce County, 559 F. 2d 1142, 1146 (9th Cir. 1977); and Childers v. Indiana School District No. 1 of Bryan County, 676 F. 2d 1338, 1343 (10th Cir. 1982).

For the same reasons, the lower federal courts have almost uniformly rejected as the applicable limitations period "notice of claim" requirements under state law, whereby a county or municipality must receive notice before a plenary action can be filed in state court. See, e.g., David v. Krouse, 478 F. Supp. 823, 825 (E.D.N.Y. 1979).

By the same token, where a state statute of limitations against a state employee or a political subdivision is keyed to indemnification requirements under state law or to the protection of sureties who may be standing behind the governmental employer, federal courts do not borrow the limitations period since they do not serve the same function in a federal action. See, e.g., Regan v. Sullivan, 557 F. 2d 300, 307 (2d Cir. 1977) (Bivens cause of action would not apply state limitations periods for different law enforcement personnel under state law).

The relevant considerations in all of these cases is (1) what burden is placed upon the complainant or plaintiff under the state procedure which is being cited as a model for the federal cause of action; (2) what is the purpose of the state procedure; (3) will the application of the state administrative complaint or notice procedure advance the interests behind the federal cause of action; and (4) will the application of the state administrative limitations period increase or decrease the volume of litigation in the federal courts.

Based on these criteria, there is no basis whatsoever for applying the six month administrative complaint procedure under Art. 49B, as the Court of Appeals properly held.

(1) Burden on plaintiff. The Fourth Circuit noted the different burdens placed on a plaintiff under the state procedure where only an "informal complaint" need be

presented which could be "fleshed out by the Commission." 710 F. 2d at 162. By contrast, the six month period might well be "an inadequate time in which to prepare a formal complaint suitable for adversary proceedings in federal court."

(2) The State Purpose. The purpose of the procedures under Art. 49B is to allow the state Commission on Human Relations to start a preliminary investigation "to satisfy itself as to the reliability of the information received from an individual, before issuing a complaint," Banach v. State Commission on Human Relations, 356 A. 2d 242, 249 (Md. Ct. of App. 1976). Thus, the six month period is not a true statute of limitations even as to the Commission itself, which may take considerably more time before it actually commences a formal adjudicatory proceeding. See Occidental Life Insurance Company v. EEOC, 432 U.S. 355 (1977). If the

six-month period is not a true limitations period for the Commission, how can it act as the model for a limitations period for the individual who filed the complaint to begin the procedures? As the Fourth Circuit held in McNutt, supra, the Art. 49B procedure is designed to eliminate the discrimination "by conference, conciliation and persuasion." If that is to be effective, "claims must be fresh." 698 F. 2d at 679. Under Sections 1981 and 1983, however, there is no such mandatory conciliation scheme or purpose.

(3) Federal interests behind the civil rights law. This Court has consistently emphasized the broad sweep of the civil rights statutes which create "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation," Mitchum v. Foster, 407 U.S. 225, 239 (1972). The law must be accorded a "sweep as

broad as its language," Griffin v. Breckenridge, 403 U.S. 88, 97 (1971). It is thus inappropriate to chose as the model for a limitations period a state law that has a far different and more restrictive -- indeed, partially conflicting -- purpose. As the Second Circuit said in Pauk v. Board of Trustees of the City University of New York, 654 F. 2d 856, (2d Cir. 1981): "It would be anomalous for a federal court to apply a state policy restricting remedies against public officials to a federal statute that is designed to augment remedies against those officials, especially a federal statute that affords remedies for the protection of constitutional rights."

(4) Limitation on litigation. Another consideration is the effect of choosing a shorter limitations period for the filing of administrative complaints on the volume of litigation in the federal courts. If this

Court were to decide that an administrative complaint period is the appropriate limitations period for Section 1981 and Section 1983 cases, there would be no point for any complaint to utilize the conciliation procedures provided for in state law. The controversy could not be settled by informal discussion and efforts at settlement. Every complainant would be required to bring a federal action in the shortest possible time without making any effort to work out a solution through the state procedures. Otherwise he would be time barred. The very rush to the federal courthouse which this Court has condemned on numerous occasions would be encouraged. That is surely not the appropriate solution to the flood of litigation in the federal courts.

For all these reasons, Art. 49B cannot be selected as the appropriate limitations period.

B. This Court's Decision in Patsy v. State Board of Regents Requires Affirmance of the Decision Below

Another reason why Art. 49B should not be selected as the appropriate limitations model is that this Court rejected any requirement of administrative exhaustion in Section 1983 cases in its recent decision in Patsy v. State Board of Regents, supra. Simply put, if a federal civil rights litigant need not follow the administrative scheme outlined under state law before he can go into federal court, he should not be required to follow the limitations period established by that same state administrative scheme. Otherwise, the administrative procedures would continue to act as a

limitation upon the full exercise of the federal right.

The relation between administrative exhaustion and administrative limitations period was noted by the First Circuit in Burns v. Sullivan, 619 F. 2d 99 (1st Cir. 1980). In that case, a white policeman, claiming that he had been passed over for promotion allegedly because of his race, he brought an action in federal court under Sections 1983 and 1985(3). He had waited almost three years from the time of the allegedly discriminatory action before commencing suit. The First Circuit noted that under Massachusetts law, the plaintiff could have appealed the adverse personnel action directly to the civil service commission within 30 days of the adverse action. The 30 day period was considered too short as a borrowing period for the Section 1983 action. In addition, a second avenue

open to the plaintiff was the filing of a complaint of racial discrimination with the Massachusetts Commission against Discrimination, an agency which investigates and may take corrective action. Judicial review of the Commission's action was available by appeal to the Massachusetts Superior Court.

The First Circuit found that the six month administrative complaint procedure was the most analogous limitations period for the federal civil rights causes of action. It reasoned that "if the plaintiff is required to exhaust his state administrative remedies ... his case will already have been prepared, and with little, if any, modification can easily be filed within six months of the decision of the state agency." 619 F. 2d at 106-07.

In short, the First Circuit assumed that a plaintiff did have to exhaust his

administrative remedies. Therefore he would have prepared his case for the administrative scheme within the six month period and that preparation would have allowed him to jump into federal court within the same time frame. Indeed, the First Circuit went on to describe various policy reasons in favor of administrative exhaustion, all of which were later rejected by this Court in Patsy:

> There are important policy reasons for using the time limitations of a state statute that protects the same rights the plaintiff seeks to vindicate by resort to the federal Civil Rights Acts. Assuming no requirement of exhaustion, a rule providing a three-year statute of limitations will allow state employees to bide their time and use the federal courts, bypassing the state administrative proceedings. Two unfortunate results will follow. First, the general government policy, observed at both the state and federal levels, of prompt resolution of personnel disputes, will be thwarted. Second, without any showing that state administrative procedures will not provide the plaintiff with due process and protect against constitutional violations, see Eisen v. Eastman, 421 F. 2d 560, 569 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970), the federal courts will become surrogate state personnel departments.
> 619 F. 2d at 107.

Since administrative exhaustion is not required, the considerations noted by the First Circuit simply do not apply, and its reasons for following the six month administrative limitations period disappear. Indeed, in a later case, the First Circuit acknowledged that "the unavailability of the state administrative remedies does tend to vitiate the policies we observed in Burns, 619 F. 2d at 107, that underlie application of the state statute of limitations to Civil Rights Acts claims." Holden v. Commission Against Discrimination, 671 F. 2d 30, 33 (1st Cir. 1982) (reaching same result as in Burns but under different reasoning, namely, the presence of a six month judicial statute of limitations).

If, under Patsy, administrative exhaustion is not necessary, the application of any administrative complaint period would seem inappropriate. There is no reason or

incentive for an individual to limit his federal action by the time period under the administrative scheme. It is an irrelevancy so far as the requirements of the federal suit concerned. The law enacted by Congress entitles him to bypass it completely. If, however, exhaustion is to be encouraged -- which Patsy certainly does not forbid -- the shorter limitations period for administrative relief must not be adopted as the judicial limit. Otherwise, the federal suit would have to be filed and would interrupt any administrative proceedings freely undergone by plaintiffs.

In short, the only Circuit that adopted a administrative complaint period as the borrowed limitations period for a Section 1981 and 1983 case did so based on its understanding that administrative exhaustion is required for such actions, a judgment rejected by this Court. The impressive

unanimity with which the Courts of Appeals have rejected administrative limitations period in § 1983 actions is eloquent testimony to the correctness of that judgment.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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